BEST AVAILABLE COPY

(2)

Supreme Court, U.S.
FILED
SEP 21 1994
OFFICE OF THE CLERK

No. 94-323

In The

# Supreme Court of the United States

October Term, 1994

ANTHONY F. LEPARDO,
D/B/A AFL Disposal Co., Inc.,

*Petitioners,*

v.

BOARD OF HEALTH AND HOSPITALS OF THE CITY OF BOSTON; LEWIS POLLACK, Individually and as he is Commissioner of the City of Boston Department of Health and Hospitals; RONALD JONES, Individually and as he is Director of the Office of Environmental Affairs of the Department of Health and Hospitals; JOHN SHEA, Individually and as he is Principal Health Inspector for the Office of Environmental Affairs; and AL SILVIA, Individually and as he is an Inspector with the Department of Health and Hospitals,

*Respondents.*

**On Petition For Writ Of Certiorari To The Supreme Judicial Court Of The Commonwealth Of Massachusetts**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ALBERT W. WALLIS*
Corporation Counsel

JOHN T. WALSH
Assistant Corporation Counsel
City of Boston Law Department
Room 615, City Hall
Boston, Massachusetts 02201
(617) 635-4047

*Counsel of Record

September 21, 1994

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

19 pp

## QUESTION PRESENTED

Whether the Superior Court and the Appeals Court for the Commonwealth of Massachusetts erred in deciding that the Board of Health and Hospitals was not estopped to deny the authority of a municipal employee unauthorized by law to issue a site assignment to operate a refuse transfer facility.

## TABLE OF CONTENTS

Page

I. Question Presented ..... i

II. Table of Authorities ..... iii

III. Opinions Below ..... 1

IV. Statutes ..... 1

V. Statement of the Case ..... 1

VI. Summary of Argument ..... 5

VII. Argument ..... 6

VIII. Conclusion ..... 11

# TABLE OF AUTHORITIES

Page

CASES

Building Inspector of Wayland v. Ellen M. Gifford Sheltering Home Corp., 344 Mass. 281 (1962) ..... 7

Chief of the Fire Department of Boston v. Sutherland Apartments, Inc., 356 Mass. 685 (1964).....8, 9

Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 472 (1987) ..... 8

Mile Road Corp. v. Boston, 345 Mass. 379 (1963) .. 7, 8, 9

Murphy v. Dover, 35 Mass. App. Ct. 904 (1993) ..... 7

Smith v. Cahoon, 283 U.S. 553 (1931)..... 10

Ulster County Court v. Allen, 442 U.S. 140 (1979) ..... 9

STATUTES

1955 Mass. Acts 310 ..... 1, 5, 8

1970 Mass. Acts 839 .....1, 5

G.L. c. 111, Section 150A .....1, 2, 4, 6, 9, 10

## OPINIONS BELOW

The Unreported Memorandum of the Appeals Court for the Commonwealth of Massachusetts is listed at 36 Mass. App. Ct. 1114, further appellate review denied, 418 Mass. 1102 (1994).

## STATUTES

1955 Mass. Acts 310

1970 Mass. Acts 839

G.L. c. 111, Section 150A

## STATEMENT OF THE CASE

In February, 1982, Anthony Lepardo (petitioner or Lepardo) purchased the land and structures at 157-171 Hampden Street, Roxbury, Massachusetts. At this time, and since 1970, G. L. c. 111, Section 150A required anyone wishing to operate a refuse transfer facility, to obtain a site assignment from the local Board of Health (Board). Lepardo knew of this legal requirement and failed to follow it. Instead, in September, 1982, he chose to disregard the law and apply to the Inspectional Services Department (ISD) to obtain a site assignment. In October, 1982, the director of Environmental Health Inspectional Services (EHS), to whom Lepardo wrongly applied for the assignment, was a member of the ISD, not the Department of Health and Hospitals, as Lepardo inaccurately represents. This individual used to be a member of the

Department of Health and Hospitals, but had been transferred to the ISD when this latter department was created in 1981. As an employee of the Department of Health and Hospitals, he had been involved in hearings on site assignment applications, but, contrary to Lepardo's allegations, he had never issued an assignment. This power had always been held only by the Commissioner of the Department of Health and Hospitals, or his designee, the Deputy Commissioner, as explained below.

In 1976, the Commissioner of Health and Hospitals delegated his authority to assign sites for waste disposal and transfer stations pursuant to G. L. c. 111, Section 150A to Lewis Pollack (Pollack), then Deputy Commissioner. Pollack then delegated the limited authority to hold site assignment hearings to the Director of EHS for the Department of Health and Hospitals, but reserved for himself the authority to issue the assignments. This process whereby the director of EHS held assignment hearings, but Pollack himself actually issued the assignments continued until the fall of 1979. At that point, a three year moratorium on the issuance of site assignments commenced.

In 1981, the Director of EHS was transferred to the newly created municipal department, the Inspectional Services Department. After this transfer, the Board voted to delegate its authority to conduct enforcement activities under statutes, ordinances and regulations to ISD, but reserved for itself the power to conduct hearings pursuant to statute, ordinance or regulation, the authority for which had not previously been delegated to an officer of

the department thereby transferred. Pollack had rescinded the authority of the EHS director to hold assignment hearings when the assignment moratorium was declared in 1979. Thus, the EHS director did not take with him the power to hold site assignment hearings, let alone the power to issue site assignments, contrary to Lepardo's allegations.

In June, 1982, the moratorium on assignments was rescinded and the Board began processing applications for site assignments. The only connection the EHS Director had with site assignments when Lepardo applied in 1982, was as one member of a three-member panel who held assignment hearings. This panel was not empowered to issue the assignment; this power resided, as it always had, in the Deputy Commissioner of the Department of Health and Hospitals. The Deputy Commissioner had delegated the power only to hold the hearings to the three-member panel.

After Lepardo applied to the wrong department for the assignment, the EHS Director without authority held a hearing and purported to issue Lepardo an assignment dated November 1, 1982.[1]

In December, 1983, thirteen months after the issuance of the alleged site assignment, Lepardo began to operate

---

[1] Petitioner's rendition of the events surrounding the issuance of a "permit" is misleading. It is true that a dump permit was issued to Lepardo. What Lepardo fails to state is that a dump permit is a totally separate document from a site assignment and is totally irrelevant to the facts of this case, which concerns the authority of the individual who purported to issue a site assignment.

a refuse transfer facility at 157-171 Hampden Street. As he was operating without an assignment issued by the Department of Health and Hospitals, the Board commenced an action in Housing Court and successfully obtained an injunction preventing such use without a valid assignment. In May, 1984, Lepardo commenced an action in the Superior Court, alleging, *inter alia*, due process and equal protection violations as a result of the Board of Health's acting to prevent further use without a valid assignment.

These two actions were consolidated, and in May, 1985, the Court, in both actions, ordered Lepardo to submit to a hearing before the proper department, the Department of Health and Hospitals, or else partial summary judgment would be entered in the Board's favor. Lepardo refused to do so, despite the Court's order. Consequently, the Court, in both actions, allowed partial summary judgment in the Board's favor, ruling that the Board was not estopped to deny the authority of the EHS director in issuing the purported site assignment. The Court ruled that detrimental reliance was not a defense against a municipality acting to disavow the validity of an illegal issuance.

In 1989, the Superior Court[2] ruled in the Board's favor that Lepardo was required to obtain a site assignment pursuant to G. L. c. 111, Section 150A to operate a refuse transfer facility. The Court rejected Lepardo's contention that he did not need a site assignment because he

---

[2] The Housing Court action had previously been dismissed on a jurisdictional matter not material to anything at issue now.

had "grandfather" rights to operate his facility without one. The Court further ruled that 1970 Mass. Acts 839, which amended 1955 Mass. Acts 310 to require that refuse transfer stations required an assignment, was not a taking of his property. In its decision, the Court pointed out the fact that Lepardo did not acquire his property until 1982 and the statute requiring site assignments became effective twelve years earlier. Lepardo attempts to mislead the Court by saying that there was no evidence that the property could have been put to other use; there was no evidence that it could not have either.

The judgments of the lower Courts were affirmed by the Massachusetts Appeals Court on April 14, 1994. The Massachusetts Supreme Judicial Court, on May 25, 1994, declined to review the Appeals Court's judgment.

## SUMMARY OF ARGUMENT

There is no reason for this Court to grant Lepardo's application for a writ of certiorari as the lower Court's decision does not conflict with any decision of this Court. Contrary to Lepardo's allegations that this is a taking case, the issue in this case is the power of a municipality to deny the authority of a municipal employee who issues a site assignment without authority. The lower Court properly applied the relevant law of Massachusetts to uphold the municipality's actions.

Lepardo lacks standing to raise the issue of a taking. Although he purports to challenge the actions of the Board of Health and Hospitals in 1983, he is actually challenging the constitutionality of a 1970 amendment

pursuant to which the Board of Health and Hospitals acted. In actuality, he argues that the 1970 law was an unconstitutional taking of his property. As he did not own the property until 1982, he cannot challenge the constitutionality of the 1970 law. Further, as he did not properly apply for the assignment required, but refused to do so, he cannot challenge its constitutionality.

## ARGUMENT

The petitioner's writ of certiorari should be denied because there is no conflict between the decision below and any decision of this Court. Further, the plaintiff lacks standing to raise the issue of a taking.

### I. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S DECISIONS.

Lepardo has improperly characterized the essential factual and legal nature of this case to argue that the lower Court's decision conflicts with decisions of this Court. Lepardo tries to portray this as a "taking" case; in actuality, it is a case involving the right of the government to enforce a public health statute against those like him who seek to flout the law. Lepardo omits to tell this Court the fact that when he purchased his property, state law, G. L. c. 111, Section 150A, required him to obtain a site assignment granted by the Board of Health and Hospitals (Board) if he wished to operate a refuse transfer facility. He also fails to acknowledge the fact that the law which was being enforced was implemented in 1970, twelve years before he even owned the property.

Lepardo's own actions in refusing to comply with the siting requirements are what prevented his operation of a refuse transfer facility, not any alleged taking by the Board in enforcing a law. Because he failed to apply properly for and obtain an assignment, the Board took Court action to protect the public from illegal property use. The Board was complying with the legal requirement for a site assignment when it disavowed the authority of the individual who improperly issued an assignment. Lepardo improperly characterizes as a taking the Board's action in complying, and enforcing compliance with, the law. The lower Court's decision affirms the legality of the Board's action in disavowing the unauthorized action of a municipal official in granting a site assignment. *See Murphy v. Dover,* 35 Mass. App. Ct. 904 (1993); *see also Building Inspector of Wayland v. Ellen M. Gifford Sheltering Home Corp.,* 344 Mass. 281 (1962). A writ of certiorari is entirely inappropriate in this case which purely and simply involves a municipality's enforcement of a public health statute.

The Court plainly considered and dealt with the taking arguments that plaintiff advanced as an ancillary part of his main case, which was a challenge to the Board's right to deny the authority of the official who illegally issued the assignment. The Appeals Court relied upon the Massachusetts case of *Mile Road Corp. v. Boston,* 345 Mass. 379 (1963) to dispose of plaintiff's taking arguments. In *Mile Road,* the Court upheld a 1962 statute prohibiting the use of certain property as a dumping ground over plaintiff's allegation that the statute was an unconstitutional taking of property that was lawfully used as a dump under the "grandfather clause" of 1955

Mass. Acts 310, Section 2. The Court held that even though the statute in question abrogated the permit and assignment to operate that the plaintiff had, these were not vested property rights immune from governmental action prospectively effective. 345 Mass. at 384. The Court then cited another Massachusetts decision, *Chief of the Fire Department of Boston v. Sutherland Apartments, Inc.*, 356 Mass. 685 (1964), which holds that even with vested property rights, the Commonwealth of Massachusetts has the power under its Constitution to interfere when public safety is involved. Lepardo's attempts to mislead this Court by saying that the Court should have are applied "facial taking jurisprudence" must fail as the lower Court properly applied the applicable law, as it related to the claims of authority, estoppel and taking of property. Lepardo's emphasis on the use of the property in the years before he bought it is irrelevant as it is disposed of by the *Mile Road* case, which the Court properly applied.

Lepardo wrongly alleges that the lower Court relied upon the case of *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 472 (1987) in making its decision. In looking at the decision of the Appeals Court, which is presumably the decision Lepardo seeks to have overturned, there is no mention, let alone discussion, of the *Keystone* case. Rather, the Court relied upon state law to dispose of Lepardo's taking arguments. Even assuming that the decision Lepardo seeks to have overturned is the Superior Court's May 24, 1989 decision, it is also false that the Superior Court relied upon *Keystone*. Although the Court did quote from that case, this reference to *Keystone* came after the Court had already cited the case

of *Mile Road, supra,* to decide that the right to use property as a refuse transfer facility is not a right immune from governmental action. (A. 14) The Court then cites the *Sutherland, supra* decision. It is clear that the Court's decision evinces no conflict with any decision of this Court.

## II. LEPARDO LACKS STANDING TO RAISE THE ISSUE OF A TAKING.

As an ancillary reason why this Court should deny Lepardo's writ, Lepardo lacks standing to raise the issues he attempts to raise. It is a fundamental principle of constitutional law that a party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights; absent such adverse impact, he lacks standing to argue that the statute would be unconstitutional if applied to third parties. *Ulster County Court v. Allen,* 442 U.S. 140 (1979). In this case, Lepardo purchased the property in question in 1982. His argument that there was a taking is that when the Massachusetts legislature in 1970 amended a 1955 law to require that refuse transfer facilities be sited under G. L. c. 111, Section 150A, without providing "grandfather" rights exempting those facilities that were already operating without an assignment, this amendment was a taking of the property. Lepardo attacks the Board's disavowal of the assignment that he had improperly obtained as a taking because the Board was enforcing the statute that required an assignment. Thus, even though Lepardo owned the property when the Board rightfully acted in 1983 to disavow his improperly obtained assignment, his

real dispute is with the effect of the 1970 law. Since he did not own the property in 1970, he cannot challenge its constitutionality. Lepardo knew in 1982 when he purchased the property that refuse transfer facilities, which he alleges he planned to operate, required a site assignment pursuant to G. L. c. 111, Section 150A. As the Superior Court pointed out in its May 24, 1989 decision, Lepardo's investment-backed expectations could not have been frustrated; he knew of the statutory siting requirement and yet purchased the property anyway. Mr. Lepardo's property was not taken.

It is also true that when a statute, valid upon its face, requires the issuance of a license as a condition to carry out a business, one who is within the statute's terms cannot raise constitutional questions regarding the statute's validity where he has failed to make the required application. *Smith v. Cahoon,* 283 U.S. 553 (1931) In this case, Lepardo is not attacking the 1970 amendment on its face; he is saying that as applied to those who already operated refuse transfer facilities in 1970, it operated as a taking. He never applied to the Department of Health and Hospitals, the agency authorized by law to assign sites. He applied to the Inspectional Services Department and refused the lower Court's order to apply for a hearing before the Board of Health and Hospitals. For this reason also, Lepardo lacks standing to question the constitutionality of the 1970 amendment requiring site assignments for refuse transfer facilities.

## CONCLUSION

For all of the above reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

Respondent Board of
Health and Hospitals,
et al.,
By their attorney
ALBERT W. WALLIS
Corporation Counsel

JOHN T. WALSH
Assistant Corporation Counsel
City of Boston
Law Department
Room 615, City Hall
Boston, Massachusetts 02201
(617) 635-4047

## APPENDIX

1955 Mass. Acts 310 ..... A1

1970 Mass. Acts 839 ..... A2

G. L. c. 111, Section 150A ..... A3

Relevant Portions of 1955 Mass. Acts 310
AN ACT CONCERNING THE ASSIGNMENT OF PLACES FOR PUBLIC AND PRIVATE DUMPS.

Be it enacted as follows:

Section 1. Chapter 111 of the General Laws is hereby amended by inserting after section 150 the following section:

– Section 150A. No place in any city or town shall be established or maintained by any person, including any political subdivision of the commonwealth, as a dumping ground for garbage, rubbish or other refuse or as a site for a refuse disposal incinerator unless such place has been assigned by the board of health of such city or town as a dumping ground or as a site for a refuse disposal incinerator subject to the provisions of any ordinance or by-law adopted therein under chapter forty A or corresponding provisions of earlier law. . . .

Section 2. Any place in use as, or publicly held or licensed for use as, a dumping ground for garbage, rubbish or other refuse or as a site for a refuse disposal incinerator on the effective date of this act shall be deemed to have been assigned under section one hundred and fifty A of chapter one hundred and eleven of the General Laws, but such assignment may be rescinded, suspended or modified in like manner as an assignment made under said section one hundred and fifty A, as appearing in section one of this act.

Relevant Portions of 1970 Mass. Acts 839
AN ACT FURTHER REGULATING THE ASSIGNMENT OF SITES FOR THE ESTABLISHMENT AND OPERATION OF REFUSE DISPOSAL FACILITIES.

Be it enacted, etc., as follows:

Chapter 111 of the General Laws is hereby amended by striking out section 150A, as most recently amended by section 1 of chapter 515 of the acts of 1969, and inserting in place thereof the following section: –

Section 150A. As used in this section, 'facility" means a sanitary landfill, a refuse transfer station, a refuse incinerator with a grate area in excess of ten square feet, a refuse composting plant, a dumping ground for refuse or any other works for treating or disposing of refuse;. . . .

No place in any city or town shall be established or maintained or operated by any person, including any political subdivision or agency of the commonwealth, as a site for a facility, unless such place has either been assigned by the board of health of such city or town as a site for a facility after a public hearing, subject to the provisions of any ordinance or by-law adopted therein under chapter forty A or corresponding provisions of earlier laws, or, in the case of an agency of the commonwealth, has been assigned by the department after a public hearing and unless public notice of such assignment has been given by the board of health. . . .

Relevant Portions of G. L. c. 111, Section 150A

"Facility", a sanitary landfill, a refuse transfer station, a refuse incinerator rated by the department at more than one ton of refuse per hour, a resource recovery facility, a refuse composting plant, a dumping ground for refuse or any other works for treating, storing, or disposing of refuse.

No place in any city or town shall be maintained or operated by any person, including any political subdivision of the commonwealth, as a site for a facility, or as an expansion of an existing facility, unless, after a public hearing, such place has been assigned by the board of health of such city or town in accordance with the provisions of this section, or, in the case of a facility owned or operated by an agency of the commonwealth, such place has been assigned by the department after a public hearing and unless public notice of such assignment has been given by the board of health or the department, whichever is applicable.